# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 47

THE TOBACCO INSTITUTE, INC., ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 48

NATIONAL ASSOCIATION OF BROADCASTERS AND WTRF-TV, INC., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 49

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 51

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION**

On June 23, 1969, the Court invited the Solicitor General to express the views of the respondents with

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respect to the applicability to these cases of the opinion in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission,* Nos. 2 and 717, O.T., 1968, decided June 9, 1969. This supplemental memorandum is submitted in response to that request.

The ruling of the Federal Communications Commission which the petitioners attack in this case requires a broadcaster who presents cigarette commercials to inform "his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user" (Pet. App. A, p. 87). While this cigarette advertising ruling originated in the traditional framework of the Fairness Doctrine that was before the Court in *Red Lion,* both the Commission and the District of Columbia Circuit properly considered it irrelevant to try to fit the ruling into the precise mold of that Doctrine. Rather, they found its basis—like that of the Fairness Doctrine itself—in the Commission's fundamental mandate to assure that broadcasters serve the statutory standards of "public interest, convenience, and necessity": In our view, the *Red Lion* decision's endorsement of the public interest mandate, as "a broad one, a power 'not niggardly but expansive'" (sl. op. p. 11), serving the First Amendment rather than conflicting with it, firmly supports its exercise in the ruling attacked in these cases.

The petitioners' contentions under the Constitution and the Communications Act are in substance that the cigarette advertising ruling is improper because it requires licensees to give significant expression to a

point of view to which they might otherwise give less emphasis or none. They complain that they are in effect being reduced to organs of government propaganda. The answer to this is essentially that which was sustained in this Court's *Red Lion* decision: The content, format, specific volume and timing of programming remain in the licensee's discretion and there is no barrier to his carrying pro-smoking discussions. The obligation to present anti-smoking viewpoints arises not because the government as an institution opposes smoking but because smoking and health are matters of public concern as to which, as the court of appeals recognized, there is a need for "facts and information vital to an informed decision to smoke or not to smoke" (Pet. App. B, 38a, 29a–30a). In other words, the ruling is simply an effort to assure adequate and fair coverage of an important issue where, without the ruling, the circumstances are such that only a one-sided presentation will be made.

Thus, what the Commission has done here is essentially what the Court endorsed in *Red Lion*. In the words of *Red Lion*, "the public interest language of the [Communications] Act authorized the Commission to require licensees to use their stations for discussion of public issues, and * * * the FCC is free to implement this requirement by reasonable rules and regulations * * *" (sl. op. pp. 13–14). As the Court further observed:

> [T]he Commission is not powerless to insist that [licensees] give adequate and fair attention to public issues. It does not violate the

> First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. * * * [Sl. op. p. 25.]

The emphasis of *Red Lion's* endorsement of the Fairness principle is properly not upon any right of reply as such but rather upon the right of viewers and listeners to be informed and to be exposed to ideas on important questions. In the specific context of *Red Lion* the broadcaster's resulting obligation to enlighten is triggered by a political endorsement or a personal attack relating to an important public issue. In the present context it is triggered by the carriage of cigarette advertising. But the important element is not so much what triggers the obligation as the underlying obligation itself, and that is the same in both situations.

Of course there are limits on the Commission's powers over programming. The Court recognized this in *Red Lion,* but considered that decision of that case did not require the Court to pass upon "every past and future decision by the FCC with regard to programming" (sl. op. p. 27). Similarly, as the court below recognized, approval of the cigarette advertising ruling does not require the courts to give the Commission a license to "scan the airwaves for offensive material" (Pet. App. B, p. 30a), or to establish "a precedent for converting broadcasting into a mouthpiece for government propaganda" (Pet. App. B, p. 38a). The court of appeals took great pains to isolate the unique medical, economic and legal factors

underlying this particular ruling and concluded that they justified special treatment of the problem of smoking and health. That conclusion was correct and just as in *Red Lion,* the Court should not undertake here a comprehensive delineation of the Commission's authority in the delicate area of program regulation.

For the foregoing reasons, as well as those stated in our brief in opposition, we submit that these cases raise no questions warranting plenary review that have not been decided in *Red Lion.* Therefore, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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